

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

U.S. FOODSERVICE, INC.

Employer

and

Case 12-RC-9413

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 79

Petitioner

DECISION AND DIRECTION OF ELECTION

U.S. Foodservice, Inc. (the Employer) operates a non-retail food distribution facility in Tampa, Florida.¹ The Petitioner, International Brotherhood of Teamsters, Local 79 (the Union), seeks to represent a unit of warehouse employees, excluding all classifications of drivers and various clerical employees. The Employer contends that an appropriate unit must include the classifications or positions sought by the Union as well as drivers and various clerical employees described further below.

Specifically, the unit sought by the Union includes the following night shift positions: selector;² loader; forklift operator; shipping and receiving clerk (also referred to on the record as "clerical/other"); utility worker; and sanitation employee. The Union further seeks to include the following day shift positions:

¹ The parties stipulated that the Employer is a Delaware corporation with an office and place of business located in Tampa, Florida, where it is engaged in business as a non-retail food distributor, and that during the past 12 months, it has derived gross revenues exceeding \$1,000,000, and has purchased and received at its Tampa, Florida facility goods valued in excess of \$50,000 directly from points located outside the State of Florida.

² There is a position on night shift that the Employer refers to as "slow pick selector," that the parties agree should be included.

receiver; forklift operator, including slow pick forklift operator; repacker (also referred to as salvage clerk); will call selector; maintenance employee; and three positions - slot clerk, returns runner, and produce clerk -that are occasionally referred to on the record collectively as day shift utility worker.³

The Employer contends that the unit sought by the Union is not an appropriate unit, and that the following classifications of drivers and day shift warehouse employees must be added: receiving clerk (also called day shipping and receiving clerk); inventory control clerk (also referred to as cycle counter); returns and refusals clerk; cashier; will call clerk; lead router (also referred to as senior router); backup router; DOT⁴ clerk;⁵ recovery driver (also referred to as hotshot driver); switcher (also referred to as yard jockey); lead driver; local driver; domiciled driver;⁶ logistics driver; and shuttle driver, excluding statutory exclusions and all other employees. The unit sought by the Union has approximately 97 employees, while the unit proposed by the Employer has approximately 216 employees.⁷

³ The unit set forth in the petition is "All full-time and regular part-time warehouse employees and label sorters employed at" the Tampa facility, excluding "Drivers, Switchers, Receivers, Supervisors, Confidential Employees and Office Personnel as described in the" Act. The Union modified its position somewhat during the hearing, and on the final day, amended the petition to seek the unit set forth in the text above.

⁴ "DOT" stands for the U.S. Department of Transportation.

⁵ The lead router, backup router, and DOT clerk are occasionally referred to on the record collectively as "transportation clerk," but for the sake of clarity, I shall use the individual titles.

⁶ Several of the driver classifications are occasionally referred to on the record collectively as "delivery driver."

⁷ In addition to the lead router and lead driver, which are in dispute, certain positions that the parties agree should be included have "lead" before their title in documents entered into the record, such as "lead receiver." It appears from the record that the parties agree that lead receivers and other leads in undisputed positions should be included.

A hearing officer of the Board conducted a hearing, and both parties were afforded the opportunity to present evidence and to submit briefs.⁸ I have considered the evidence and arguments presented by the parties.⁹ As explained below, I conclude that the unit sought by the Union must include the receiving clerk, inventory control clerk, returns and refusals clerk, will call clerk, cashier, lead router, backup router, and DOT clerk,¹⁰ but shall exclude the drivers. There are approximately 107 employees in the unit found appropriate herein.

After setting forth a brief overview of the Employer's operations, I will summarize the relevant facts regarding the positions at issue, and then apply the controlling Board principles.

A. Employer's Tampa Operations and Facility

The Employer's Tampa facility consists of a large one story warehouse, loading docks, an attached office building, and an employee parking lot. Roughly 385 employees work out of the Tampa facility, including approximately 100 working in the warehouse and 103 drivers. The Employer refers to the Tampa facility as its "Tampa division" to distinguish it from other divisions.

Tampa operations are broken down into various departments, of which the relevant ones for purposes of this case are the night shift warehouse (the night

⁸ The Employer filed a brief. The Union chose to make a closing argument, including citations to Board case law, but did not file a brief.

⁹ I have carefully considered the Employer's brief and the Union's closing argument.

¹⁰ At the hearing, the parties stipulated, and I find based upon the record as a whole, that the following positions are excluded because they exercise supervisory authority within the meaning of Section 2(11) of the Act: Division President; Vice President of Operations; Director of Operations; Vice President of Finance; Vice President of Human Resources; Vice President of Procurement; Vice President of Marketing; Executive Vice President; Vice President of Sales; night shift warehouse supervisor; day warehouse manager; day shift warehouse supervisor; transportation manager; and transportation supervisor. In addition, it is clear from the record that the night manager, a position currently vacant, exercises supervisory authority within the meaning of Section 2(11) and should be excluded.

warehouse), the day shift warehouse (the day warehouse), transportation, and finance. All of the positions at issue fall within these departments. Each department has a separate budget. Each department has its own first level and second level supervisors.¹¹ The first and second level supervisors in transportation and finance do not work nights.

The Employer's warehouse consists of three large storage areas, known as the freezer (for frozen food), the cooler (for refrigerated dry food), and dry storage (for food that can be stored at room temperature, as well as non-food items in the Employer's inventory).¹² Each area of the warehouse has its own dock for loading and unloading trucks.

Each morning, the Employer receives products from vendors which are unloaded by receivers and placed in storage spaces on racks by day forklift operators. Each night, night forklift operators (night lift operators) remove products from their storage spaces and loaders load them onto trucks at the appropriate dock for delivery to customers,¹³ as well as to the Employer's sister facilities in other states.

In each of the three warehouse areas, products are arranged in aisles and stored in cases on racks ranging in height from 20 to 25 feet. Selectors pull items from the racks at night to fill customer orders. The space from which items

¹¹ The first level supervisors are: the three night warehouse supervisors, the day warehouse supervisor, the four transportation supervisors, and the inventory control manager (for the finance department). The second level supervisors are: night warehouse manager (this position was vacant at the time of the hearing), the day warehouse manager, the transportation manager, and the Vice President of Finance.

¹² The Employer currently has over 12,400 items in its inventory.

¹³ Orders are generated three main ways: from the Employer's sales department, from customers who enter orders on line, and from customers who call the Employer's customer service representatives (these positions are not at issue).

are pulled is called the “pick slot” or just “pick” area. Once a certain volume of the product has been removed from the pick area, lift operators “replenish” it with items from the top of each stack, which is known as the reserve or reserve slot.¹⁴ About 65 percent of replenishing is performed on the day shift, so that the night shift employees can focus on pulling, staging, and loading orders.

In addition to its Tampa facility, the Employer rents yards in five “remote” locations in Florida to use as transfer points for shipments that are then delivered from each location. These five yards are in Ocala, Orlando, Port Orange, Lake City, and Ft. Myers.

In general, day warehouse employees start work between 5:30 and 6:00 a.m.,¹⁵ and the day shift completes operations by 4:00 p.m.¹⁶ Most night warehouse employees begin work between 5:30 and 6:00 p.m.¹⁷ and work until the trucks have all been loaded for deliveries the next day. It appears from the record that the incoming trucks must arrive by 1:00 p.m. in order to be unloaded that day. The day warehouse operates from Monday through Friday; the night warehouse operates from Sunday night¹⁸ through Friday night. All warehouse employees are paid hourly and receive overtime for working more than 40 hours per week, and all warehouse employees have the discretion to work overtime as needed.

¹⁴ It appears from the record that the term “replenish” is also used to refer to the process of transporting incoming product to its assigned location in the warehouse.

¹⁵ There is one day warehouse schedule in the record, covering June 7-11, 2010. Most employees were scheduled to begin at 5:30 or 6:00 a.m. Three employees (two lead receivers and a receiving clerk) were scheduled to begin at 5:00 a.m.

¹⁶ As will be explained, certain warehouse positions in dispute work slightly different hours.

¹⁷ One night warehouse operator starts work at 4 p.m. This individual will be further discussed when I address the disputed positions.

¹⁸ Night warehouse employees start work at 5 p.m. on Sunday.

All employees at the Tampa facility park in the employee parking lot. Warehouse employees enter through the main entrance leading directly into the office building. The office building includes the finance department, where the inventory control clerk works in a cubicle. Drivers have a separate entrance leading into the portion of the warehouse where the operations office is located, which is apart from the main office area; the day and night warehouse supervisors and the day manager work in the operations office.¹⁹

The transportation office is situated further into the warehouse past the operations office and will call (there is a small will call area next to the operations office), and connected to them by a walkway. The transportation office is next to the driver lunch room, also referred to as the transportation lunch room. The record reflects that employees in night and day warehouse positions as well as other employees regularly use the driver lunch room. The transportation supervisors work from cubicles adjacent to the transportation office, and the lead router, the backup router and the DOT clerk work mainly in the transportation office, which is also referred to as the routing office. The work space for the cashier is reached by entering the transportation office.²⁰

It appears from the record that there is a small office referred to as the receiving office, where the day receiving clerks work; this office is next to the driver lunch room and the transportation office and is separated from the driver lunch room by a sliding glass window.

¹⁹ Two of the three night supervisors also work from the warehouse office. The Vice President of Operations testified that when the Employer fills the night manager position, this person will work from a renovated office on the second story of this structure.

²⁰ It appears from the record that the cashier works in a separate office, with a glass partition between this office and the driver lunch room.

There is a small will call waiting area and office, attached to the operations office,²¹ and a will call cooler located nearby.²² The will call cooler has a door leading from the will call waiting area and another door leading into a tunnel that connects the freezer dock and the dry dock. Will call occurs when a customer or salesman calls because an order was “mispicked” (items ordered were not shipped and/or items shipped were not those ordered), out of stock, or damaged, or to quickly fill a small order which the customer will pick up himself.

The warehouse contains a two-story, portable office roughly 12 feet by 16 feet with sliding glass windows on two sides; it is located between the dry dock and the refrigerated dock. One of the two night shipping and receiving clerks works at a computer located on the ground floor of this office, as do the slot clerks.²³ Also within the warehouse is a small, portable office containing two doors and four windows looking out onto the dry dock; there is a computer inside this office used by the returns and refusals clerk, and on occasion by slot clerks.²⁴

Other than the drivers, most of the remaining positions at issue work throughout the warehouse, moving between the storage aisles, the dock, the will call area, and the drivers' lunch room.

Employees are permitted to clock in at either of two Kronos time clocks. One time clock is located on the wall immediately to the left of the main entrance;

²¹ It appears from the record that the will call office is not enclosed by walls but is part of the area where customers wait for will call pick ups.

²² The will call cooler is approximately 10-15 feet from the freezer dock.

²³ The other night shipping and receiving clerk works at a table set up immediately outside the operations office.

²⁴ The returns and refusals clerk described his work space as looking like a trailer.

the other time clock is located in the driver lunch room, as is the ZADA time clock, used only by drivers, as I will explain below.²⁵ All employees are permitted to use the driver lunch room and the break room located next to the main office,²⁶ as well as either of two sets of rest rooms, one of which is located near the main office, and the other of which is near the driver lunch room.

Many of the Employer's contacts with vendors and customers, as well as internal communications needed to process orders and track inventory, are conducted on line using Tandem. This is the Employer's computer program that coordinates all aspects of the distribution process. Different departments use it for their respective functions. The Employer also uses various other programs, including Truck Builder, an operating system that configures the placement of pallets on each truck so the driver can unload products in the sequence required by his route and the nature of the product (frozen, refrigerated, or dry).

Warehouse employees and some of the positions the Employer seeks to add to the unit use various types of equipment requiring certification, as will be explained in more detail below. It appears from the record that there are three types of forklift: a sit-down forklift, a stand-up forklift, and a type of stand-up forklift referred to as the slow pick forklift or platform lift; the platform lift is mainly used by night shift slow pick selectors and by the day shift slow pick lift operators.²⁷ Lift operators, receivers, some utility workers, and certain other

²⁵ The record reflects that some day and night warehouse department employees occasionally use the Kronos inside the driver lunch room.

²⁶ The record reflects that day and night warehouse employees occasionally use the driver break room.

²⁷ Slow pick refers to two areas in the warehouse where the Employer stores slower moving items such as small volume items. There is a slow pick area in the freezer section of the warehouse and one in the dry section.

positions use one or more of the forklifts, each of which requires a separate certification.²⁸

There are three types of pallet jacks: the single pallet jack and the double pallet jack,²⁹ both of which are motorized and require certification, and the walking pallet jack.³⁰ Most positions in the warehouse use at least one type of motorized pallet jack.³¹

Employees are eligible for various premiums or differentials, depending upon their job. All night positions except selector receive a \$.25 per hour differential. All positions requiring work inside the freezer or cooler receive a differential of \$.30 per hour. Lead drivers receive a differential of \$.70 per hour. It appears from the record that the slow pick selector (a night position) and slow pick lift operator (a day position) receive a differential of \$.50 per hour in recognition of the additional training required to operate the platform lift. Employees also receive a \$.13 per hour safety incentive if they have not had a "chargeable accident" within 13 weeks; the determination of whether an accident is chargeable is made by an accident review board.

Warehouse employees are not required to wear uniforms; the Employer provides T-shirts and pants for those who choose to do so. Although the record is not altogether clear, it appears that warehouse workers in many positions, and all drivers, including the switcher, are required to wear steel toed shoes.³² The

²⁸ The supplier of the forklifts determines the certification requirements.

²⁹ The double pallet jack is longer than the single pallet jack.

³⁰ The walking pallet jack is only used on the night shift.

³¹ The Vice President of Operations testified at one point that he believes every position inside the warehouse is certified to operate a pallet jack.

³² The Employer provides \$35 per year toward the purchase of steel toed shoes for those employees required to wear them.

record includes a written policy regarding safety shoes, titled: "Tampa Division Safety Shoe Policy" with an effective date of January 15, 2008. According to the policy, all employees working in the warehouse, on the loading docks, or on trailers being loaded and unloaded must wear "safety shoes." It appears from the record that steel toed shoes are "safety shoes." Employer witnesses testified that the Employer requires steel toed shoes for employees who work in what it deems "safety sensitive" positions. The Vice President of Human Resources testified that this refers to employees who spend a specified percentage of their shift inside the warehouse (she testified that she believed this was ten per cent), and that the day receiving clerk, the will call clerk, the lead router, the backup router, the DOT clerk, and the cashier are not safety sensitive positions and do not wear steel toed shoes.³³

I shall now set forth the supervisory structure for the relevant positions. I will then describe the duties, skills, qualifications, and working conditions, and compensation for the positions sought by the Union, as well as for those that the Employer seeks to add. Where appropriate, I provide the number of employees in a position.

B. Supervisors

All of the night warehouse positions that the Union seeks to represent are in the night warehouse department and the day warehouse department, and are

³³ The safety specialist testified that safety sensitive positions refers to positions in "the warehouse" and transportation, as well as ICC; the safety specialist did not specifically address the day receiving clerk, the returns and refusals clerk, the will call clerk, the cashier, the lead router, the backup router, and the DOT clerk. The safety specialist also testified that safety sensitive positions include anyone handling seafood, and that it includes "anybody that actually handles equipment where, and that would be in danger of causing injury to themselves or property; and then also in our industry it would be anybody that handles food."

supervised by the night warehouse supervisors and night manager and by the day warehouse supervisor and day manager. A night warehouse supervisor testified that he has the authority to discipline employees,³⁴ and that he makes recommendations to the Human Resources department concerning hiring decisions, and that for the most part the Human Resources department follows his recommendation. He testified that he does not have the authority to fire.

The inventory control clerk, returns and refusals clerk, and will call clerk work in the finance department and are supervised by the inventory control manager and the Vice President of Finance. The inventory control manager has the authority to hire, fire, and discipline employees under his supervision. The cashier is supervised by the controller and the Vice President of Finance.

The senior router, backup router, and DOT clerk work in the transportation department and are supervised by the transportation supervisors and the transportation manager. All driver positions and the switcher are supervised by the transportation supervisors and the transportation manager. The Vice President of Operations is ultimately responsible for the drivers as well as the employees in the warehouse departments.

The Vice President of Operations testified that transportation supervisors do not supervise day or night warehouse employees, and that warehouse supervisors do not supervise transportation department employees.

Transportation supervisors and the transportation manager begin work at about 4:00 a.m. and leave by 6:00 p.m. The record reflects that drivers occasionally

³⁴ He testified that he lets the Human Resources department review any discipline, but indicated that this is a procedural step and that he then implements the discipline.

confer with night warehouse supervisors and the night warehouse manager if they have a problem. Additionally, the two switchers start work at 4:00 p.m. and 5:00 p.m. They are supervised by night warehouse supervisors after 6:00 p.m. However, a transportation supervisor testified that communications between switchers and night warehouse supervisors are infrequent. On one occasion, a night manager wrote up a switcher, but the record does not reflect when this occurred or the degree of discipline it entailed, if any.

One night lift operator starts work at 4:00 p.m. rather than 6:00 p.m., Monday through Thursday, and works for two hours loading and unloading backhaul for logistics drivers who bring products in that are to be immediately shipped back out to one of the Employer's sister divisions. This lift operator reports to the transportation supervisor at 4:00 p.m. However, the transportation supervisor testified that although this lift operator reports to him from 4:00 p.m. to 6:00 p.m., he is not the lift operator's supervisor.³⁵

C. Positions in the Unit Sought by the Union

1. Night Warehouse Positions

Selector

Selectors pick cases of products ordered by customers from pick slots in the three warehouse areas.³⁶ The selector uses a pallet jack³⁷ to move products from racks to the pallet.³⁸ The selector gets each assignment from a "blind box"³⁹

³⁵ The transportation supervisor testified that a loader also comes in at 4:00 p.m. to assist unloading the backhaul for logistics drivers, but this individual was "on light duty," and does not appear to permanently work these hours.

³⁶ Selectors are assigned to a particular area, whether freezer, refrigerated, or dry.

³⁷ It appears from the record that selectors use one or both of the motorized pallet jacks.

³⁸ Selectors are not required to use forklifts. Some have chosen to become certified to do so.

containing labels printed each night shift by one of the shipping and receiving clerks.⁴⁰ The labels enable the Employer to track each order and maintain records of remaining inventory.

The selector wears a headset attached to a belt, which enables him to log on to a system called Voxware.⁴¹ As the selector receives each label from the blind box, he reads the assignment number on the label into a headset, and Voxware then directs him (through the headset) to the proper aisle and pick slot. Once the selector has picked the item, he reads a number from the rack into his headset, at which point the Voxware system tells him how many of the item to pick and place on the pallet.⁴² The selector then uses the pallet to transport the picked items to the appropriate loading dock, where he stages them.⁴³ Voxware tells the selector where to stage the order for loading.⁴⁴ It appears from the record that the selector also shrink wraps palletized orders.⁴⁵

Two of the selectors are referred to as “slow pick selectors.” They pick items in the slow pick aisles.

³⁹ The box is apparently considered “blind” because selectors cannot choose labels according to individual preference.

⁴⁰ This is the shipping and receiving clerk working from a table immediately outside the operations office.

⁴¹ The selector is the only warehouse position that uses headsets.

⁴² It appears from the record that the selector also affixes the label to the picked item.

⁴³ Staging means organizing the products in the order in which they will be delivered.

⁴⁴ Voxware directs the selector to the appropriate loading dock door.

⁴⁵ In discussing the job duties of various positions, I shall incorporate information from job postings for some of the positions, where that information appears to be reliable. The Employer apparently does not maintain separate job descriptions. The Vice President of Human Resources testified that the Employer keeps its job descriptions in the same format as its job postings. However, some of the job postings in the record appear to relate to openings in the Employer's other locations (divisions), and do not accurately reflect the duties of the position in Tampa. For instance, the posting for selector does not mention Voxware while a posting for night forklift operator states that one duty of the position is “[s]elect orders using the Voxware system.”

The selector is the only warehouse position whose hourly compensation depends upon productivity. The selectors are paid according to a performance formula. Each pick assignment is allotted a certain amount of time; the selector must maintain an overall average of at least 100 per cent to receive \$16.35 per hour, with a maximum of \$22.90 per hour; if the selector's production averages less than 100 per cent, he receives \$13.00 per hour. In addition, \$.40 per hour is deducted for errors in picking orders.⁴⁶

The Vice President of Operations testified that some selectors work "on occasion" as forklift operators (if certified), but that this occurred not very often." He testified that forklift operators work as selectors "on occasion" when too few selectors are at work. The record does not reflect how often this has occurred.

The record reflects one instance of permanent transfer by a night selector: a night selector hired in October, 2006, transferred to a position as night shipping and receiving clerk in May, 2008.

Loader

After selectors have wrapped and staged pallets at the dock, loaders load them onto the appropriate trailers. Loaders use a load map that tells them where each pallet goes inside the trailer.⁴⁷ One of the night shipping and receiving clerks generates the load maps on Truck Builder.

⁴⁶ It appears from the record that the deduction is triggered if the selector makes one error out of 1,400 items picked.

⁴⁷ It appears from the record that load maps also show the driver the sequence and location of his delivery stops.

Loaders use the motorized pallet jacks, but are not required to use forklifts. Loaders are paid \$17.24 per hour, plus the night shift differential of \$.25 per hour.

Night Lift Operator

The night lift operator replenishes pick slots with product from reserve slots to maintain inventory levels after the selector has removed the product to fill an order. In doing so, the night lift operator uses a hand-held electronic scanner known as the RF gun, which is integrated into Tandem. He also assists the selector when needed in transporting orders to the dock. He must be certified on the type(s) of lift he operates. The night lift operator is paid \$17.24 per hour and the night differential.

The Vice President of Operations testified that night lift operators work as loader five or six times per month, depending upon volume and attendance, and that loaders who are certified occasionally work as night lift operators. However, he did not give specific examples, and the record does not reflect any.

Night Utility Worker

The night utility worker performs a variety of functions in the warehouse. After the slow pick selector picks multiple orders with different routes, they are combined onto one pallet so that the utility worker can “merge” each order with its appropriate route; this entails bringing the order to the door assigned to that route and merging it onto the existing pallets that the selector has staged at that

door. The night utility worker also assists the night lift operators with replenishment,⁴⁸ and assists the loaders.

One night utility worker is called the “short runner.” He retrieves items that were not contained in sufficient quantity in their pick slot,⁴⁹ so that the order can be filled.

The Vice President of Operations testified that a night utility worker has worked as a night shipping and receiving clerk, but the record does not reflect how often this has occurred, or whether the night utility worker substituted for an absent shipping and receiving clerk or merely helped out.

The night utility worker operates a motorized pallet jack and receives \$17.24 per hour, as well as the night differential.

Night Shipping and Receiving Clerk

There are two shipping and receiving clerks on nights. One of them works at a table immediately outside the operations office, where he spends five to seven hours per shift generating pick labels for selectors, as explained above. The entire warehouse is divided into seven zones, and this shipping and receiving clerk separates the labels according to the zone of the product identified on the label. He then places them in the “blind box” for the selectors to take.

The other shipping and receiving clerk works in the warehouse office, where he assembles pouches of paperwork for drivers, beginning with shuttle

⁴⁸ Although most utility workers are certified to drive a forklift, the record does not reflect whether this is a job requirement.

⁴⁹ The short runner is only needed when the item cannot be replenished to the pick slot before the selector has moved on to his next assignment.

drivers, who have to depart by 8:00 p.m. (The duties of the shuttle drivers are explained below.) The pouch consists of the invoices for the route, the manifest (the manifest lists each stop and delivery time), and the list of any hazardous materials being transported. The shipping and receiving clerk brings the pouches to the drivers in the driver lunch room. If the driver is not yet in (as is the case with most drivers other than shuttle drivers), the shipping and receiving clerk places the pouches in driver cubbyholes located in the transportation area.

The same shipping and receiving clerk also assembles the load maps and gives them to the night supervisor, who distributes them to the loaders.

Both shipping and receiving clerks also assist in researching what the Employer calls "cuts." These are orders from the previous night that had some problem, whether a mispick, a short (order contained too few of an item or was missing an item), a discrepancy between what was indicated in inventory and what the selector found, etc. The shipping and receiving clerk tries to resolve the cut using Tandem. In addition, the shipping and receiving clerk who works in the warehouse office occasionally physically walks the aisles seeking to resolve the cut. The night supervisor testified that the shipping and receiving clerks spend about five per cent of each shift on cuts.

One night shipping and receiving clerk was scheduled as a loader one Friday night every three weeks, but it appears from the record that this is no longer the case.

Both shipping and receiving clerks are certified on the motorized pallet jacks. They are not required to wear steel toed shoes.

The night shipping and receiving clerks are paid within a range from \$13.43 per hour to \$16.50 per hour, as well as the night differential.

Sanitation Employee

The night sanitation employee cleans up any product spills, debris, or damaged cases in the aisles throughout the warehouse, including in the freezer and cooler. He sweeps, mops, and dusts throughout the warehouse.⁵⁰ The night sanitation employee also cleans the docks at the end of his shift. He cleans the rest rooms and locker rooms in the warehouse, as well as the driver lunch room.

The night sanitation employee uses a pallet jack.⁵¹ He is paid within a range of \$11.52 per hour to \$14.32 per hour, as well as the night differential.

2. Day Warehouse Positions

Receiver

There are six receivers, two assigned to each dock.

After inbound product⁵² has been removed from the truck and broken down by pallet, the receiver examines it on the dock to ensure that it is of the correct pack or size, quantity, quality, and temperature.⁵³ The receiver then applies labels to each item received. The receiver uses a scanning instrument known as the RF gun to scan each label. The receiver also reviews invoices and other paperwork, and signs purchase orders.

⁵⁰ The Employer uses a contractor to clean the offices, apparently including those in the warehouse.

⁵¹ It appears from the record that he uses one of the motorized pallet jacks.

⁵² Inbound shipments arrive roughly between 6:00 a.m. and 3:00 p.m.

⁵³ Shipments containing items that must be stored at certain temperatures, including both cooler items and freezer items, have a device that records the temperature of the product from the moment it is loaded until it is unloaded. The receiver downloads the data from this device to ensure that the product has been stored at the correct temperature at all times while in transit. The receiver also takes the temperature of that product.

Five of the six receivers are certified to drive a forklift. A receiver testified that he spends about half of each shift assisting the lift operators by driving a forklift to store products he has just received, as well as to replenish picked slots. This receiver testified that the other receivers certified to drive a forklift also assist lift operators in this manner. This receiver also testified that he interacts with delivery drivers late in his shift when they return with what is known as “backhaul” (products brought back to the terminal from vendors for later delivery to customers). The receiver performs similar duties as with incoming product in the morning, verifying that the paperwork is accurate, inspecting the load, and occasionally assisting with unloading it. In doing so, he interacts with the driver whose backhaul is involved.

A receiver testified that toward the end of the day, he sometimes assists in running returned products to the freezer and cooler (the returns runner position is discussed below). The record does not reflect how frequently this occurs.

The receiver is paid \$17.24 per hour.

The day manager testified that the receiver may work as a lift operator if there is an absence or someone goes home sick, but the record does not reflect specific examples or the frequency with which this has occurred. A receiver testified that he has performed some of the duties of the day receiving clerk (such as making appointments with carriers delivering inbound product), as well as the duties of the repacker, but the record does not reflect specific occasions on which he substituted for these positions.

Day Lift Operator

Each day lift operator is assigned to a specific zone or group of aisles. The day lift operator performs many of the same functions as night lift operator. He transports products that have been received by receivers from the aisle to the correct reserve slot.⁵⁴ He replenishes pick slots with product from reserve slots to maintain inventory levels for selectors, using the RF gun.⁵⁵ The day lift operator also ensures that product is stored securely in the slot so as to avoid damage or injury when it is later selected to fill an order.

Two of the day lift operators are slow pick operators. They move slow pick products using the platform lift. This requires them to stand on a platform and pick each item by hand, stacking them on the lift. It appears from the record that items in the slow pick aisles can only be reached using the platform lift, and that the slow pick operator has to be trained to work in a harness.

The day lift operator is paid \$17.24 per hour.

The Vice President of Operations testified that about 30 per cent of the day lift operators are trained as day receiving clerks, and that they substitute for the day receiving clerk six or seven weeks per year, when the receiving clerk is on vacation. The Vice President of Operations did not identify the day lift operators who fill in for the day receiving clerk. He also testified that day lift operators work as receiver and salvage clerk, but the record does not reflect

⁵⁴ The Employer contracts with another company to supply "runners" who move incoming products that have been received and tagged from the dock to the proper aisle. In addition, over-the-road drivers who are not employed by the Employer can hire the same contractor to provide "lumpers," who unload the truck onto the dock where the receivers perform their duties. The parties stipulated that the lumpers and runners are excluded.

⁵⁵ This is apparently also called a "let down."

specific examples, or whether the day lift operator is filling in for an absent receiver or merely helping a receiver.

Will Call Selector

There is a will call selector on day shift. He picks only will call orders, after receiving them from the will call clerk. He brings most orders into the will call cooler and stages them; then the will call clerk verifies that the order has been correctly picked.⁵⁶ The will call clerk brings the order from the will call cooler into the will call office area, where it is picked up by the customer. Both the will call selector and will call clerk often assist the customer in carrying the order out to the customer's vehicle. When not selecting an order, the will call selector uses the same unenclosed office space used by the will call clerk.⁵⁷ The will call selector is rarely assigned other warehouse tasks.

When the will call selector is absent, a day lift operator fills in.

The will call selector is paid hourly, at \$17.24 per hour. The will call selector also receives a differential of \$.30 per hour for work performed in the freezer or cooler.

Slot Clerk

There are two slot clerks on the day shift, also referred to as day utility workers.

The slot clerk establishes slot locations for newly stocked items, taking into account other items along the same pick path.⁵⁸ The slot clerk reslots

⁵⁶ If the order is large, the will call selector stages it on the dock.

⁵⁷ The will call selector has a chair in this space.

⁵⁸ For example, potato chips would not be placed at the beginning of a pick path that also contains 40 pound cases of beans.

existing items that have to be moved because seasonal demand has changed or as the result of market developments. The slot clerk determines how much volume to maintain in a given slot based on the speed with which orders for that item are being filled. In doing so, the slot clerk is guided by a “velocity report” that the Employer generates on each item on a weekly basis.

The slot clerk also assists in replenishing slots.⁵⁹ The slot clerk must be certified on the forklift and pallet jacks.

It appears from the record that the slot clerk receives \$17.24 per hour.

Maintenance

There is one maintenance employee. He does general maintenance such as plumbing repairs; the Employer uses a contractor to maintain equipment such as pallet jacks and lifts.⁶⁰ The maintenance employee has recently begun to take responsibility for some repairs previously contracted out, such as dock plates (used to unload trucks). He supplies tools used by warehouse employees to repair latches on dock doors and perform other minor facility maintenance tasks.

The maintenance employee is paid \$21.44 per hour.

The day warehouse manager testified that a receiver performs certain duties normally performed by the maintenance employee when the maintenance employee is absent. The record does not reflect any specific examples of this.

⁵⁹ One slot clerk checks the “code dates” of meat and dairy products, apparently because these products have expiration dates.

⁶⁰ The day manager testified that the maintenance employee helps monitor the repairs done by the contractor.

Returns Runner

When product that the Employer delivered is returned,⁶¹ it is unloaded and temporarily stored in one of three segregated locations outside the freezer, cooler, and dry storage areas. If the returns and refusals clerk determines that it is still salable, the returns runner, also called a day utility worker, transports the return back to the correct pick slot.

The returns runner is paid \$17.24 per hour. It appears from the record that he operates the motorized pallet jacks, although it is not clear from the record whether he operates a forklift.

Produce Clerk

The produce clerk, also called a day utility worker, inspects produce to ensure freshness. The cooler storage area has three sections for produce, depending on the required temperature (35, 40, or 55 degrees). When the produce clerk identifies spoiled produce, he pulls it from its pick slot and contacts the produce buyer/quality control person, who works in the procurement department,⁶² but whose work space is the small office on the dry dock occupied by the returns and refusals clerk (discussed below). The record does not reflect whether the produce clerk has authority to dispose of spoiled produce without the approval of the produce buyer/quality control.⁶³

The produce clerk receives \$17.24 per hour. The record does not reflect whether he uses pallet jacks or a forklift.

⁶¹ Products may be returned due to damage or because of a mispick, or for other reasons.

⁶² The produce clerk is supervised by the day warehouse supervisor.

⁶³ It appears from the record that the produce buyer/quality control inspects all incoming produce, whereas the produce clerk inspects existing inventory.

Repacker

The repacker, also known as the salvage clerk, repackages damaged products, whether returns or products that were damaged inside the warehouse, in order to preserve as much as possible. This may involve simply replacing the carton containing a product or resealing a package. Other warehouse employees generally bring the damaged product to designated areas of the cooler, freezer, and dry storage sections. However, the repacker also moves throughout the warehouse to pull damaged inventory.

The Vice President of Operations testified that the warehouse generates two to three pallets of damaged product per day in normal operations.

It appears from the record that the repacker operates a forklift and pallet jacks. When the repacker is absent or behind in his work, a day utility worker or a receiver works as a repacker.

The repacker is paid \$17.24 per hour.

D. Positions the Employer Seeks to Add

1. Positions in the Day Warehouse Department

Day Receiving Clerk⁶⁴

There are two day receiving clerks.⁶⁵ They work in the small receiving office adjacent to the driver lunch room. Access to this office is technically

⁶⁴ This position is sometimes referred to in the record as "day shipping and receiving clerk."

⁶⁵ The day receiving clerk starts works at roughly 5:30 a.m.

restricted, but employees in several classifications have swipe cards.⁶⁶ The receiving clerk spends almost the entire shift in this office.⁶⁷

The day receiving clerk handles the paperwork from drivers for carriers delivering products that the Employer has purchased for inventory, and from logistics drivers and delivery drivers returning with backhaul. When the driver arrives, the day receiving clerk assigns the driver a door for unloading.⁶⁸ The driver then brings the day receiving clerk the invoice, which the day receiving clerk compares to the receiving document for that purchase order. The receiving document is a form that the day receiving clerk generates on Tandem for the receiver, on which the receiver notes any items that were damaged, or for which the wrong quantity was received. The day receiving clerk also gives the receiver labels for each order, which the receiver places on each item and scans with the RF gun, both before and after affixing the label to the item; this verifies the count of what has been received. If the receiver finds that the count is off (the wrong item was shipped, the wrong quantity, etc.), he informs the day receiving clerk and they work together in an effort to resolve the problem. Sometimes, the day receiving clerk works with a day utility worker to resolve the problem, or confers with the Employer's procurement department.⁶⁹ After making any needed changes to the receiving document, the day receiving clerk gives it to the

⁶⁶ It appears from the record that receivers, sanitation employees, the will call selector, transportation department employees, and perhaps other positions have access to this office as well.

⁶⁷ One of the two day receiving clerks spends 100 per cent of her time in the office.

⁶⁸ In assigning doors, the day receiving clerk determines the sequence in which drivers will be permitted to unload.

⁶⁹ The day receiving clerk contacts the buyer of the product involved.

receiver assigned to that order. Throughout the process of preparing and adjusting the receiving documents, the day receiving clerk uses Tandem.

One of the day receiving clerks also makes appointments for carriers to deliver at a particular time at a specific door.⁷⁰

The day receiving clerk clocks in using the Kronos at the main warehouse entrance, and takes breaks in the driver lunch room. He does not wear steel toed shoes and is not certified to drive a forklift or pallet jack. The day receiving clerk is not required to wear a uniform, but one day receiving clerk chooses to wear one of the Employer's t-shirts, for which the Employer pays.

The day receiving clerks are paid within a range of \$13.43 to \$16.50 per hour. One day receiving clerk testified that she receives about \$15 per hour.

The day warehouse manager testified that when the day receiving clerk is absent, a receiver or a day utility worker fills in, or the day warehouse manager does so himself. The record does not contain any specific examples.

2. Positions in the Finance Department that the Employer Seeks to Include

Inventory Control Clerk

The three inventory control clerks (ICC), also called cycle counter, are each responsible for a separate area of the warehouse (dry, refrigerated, freezer). The ICC performs a quarterly count of all inventory, using the RF gun. The ICC also audits various products to verify that the Employer's inventory records are accurate.

⁷⁰ In making these appointments, day receiving clerks use an automated system called "SmartDock." It appears from the record that no other positions involved in this case use SmartDock.

When first starting each morning,⁷¹ the ICC addresses orders from the previous night that could not be filled, such as mispicks, orders which could not be filled because there was not enough of the product in inventory (known as a truck short), and similar problems. The Employer refers to these problems from the previous night as the “cuts batch.”⁷² Every morning, the ICC is responsible for researching warehouse cuts batch in his assigned section of the warehouse. In part, the ICC does this research by going into the warehouse and trying to figure out what may have caused the cut.⁷³ The ICC interacts regularly with lift operators, receivers, and slot clerks. The ICC also uses Tandem to try and determine the cause of the cut, whether a pallet having been stored in the wrong slot, or stored with the wrong quantity of an item, etc. The ICC reports his findings to his managers, including his assessment of who was responsible, but does not recommend discipline.

Additionally, throughout his shift, the ICC uses the computer to input data from the quarterly inventory count and any audits.

The ICC works at a cubicle in the finance department office, which is part of the main office suite, where customer service is located. The inventory control manager, who is the immediate supervisor of the ICC, returns and refusals clerk, and will call clerk, also works in the finance office. The ICC spends roughly 70 to 75 per cent of his shift out in the warehouse aisles, and the rest in the office.

⁷¹ The inventory control clerk works from 6:00 a.m. to 2:30 p.m.

⁷² This is because the Employer cuts the missing product from the appropriate invoice.

⁷³ The ICC occasionally discusses the problem with the driver whose delivery contained the wrong item. The ICC does not move products except from one part of a slot to another.

The ICC is required to wear steel toed shoes, but not a uniform.⁷⁴ He must be certified to use the pallet jack and the slow pick or platform lift, and it appears from the record that he occasionally uses each. The job posting for the ICC states that a high school diploma or its equivalent is required; for most of the positions in the warehouse, it is merely “preferred.”

When the ICC is absent, a returns and refusals clerk or the will call clerk fills in; the ICC, returns and refusals clerk, and will call clerk are cross-trained with one another but never substitute for day or night warehouse department employees or transportation department employees, nor do they fill in for an absent ICC, returns and refusals clerk, or will call clerk.

The ICC is paid within a range of \$16.66 to \$17.18 per hour.

Returns and Refusals Clerk

The returns and refusals clerk examines returned and refused products⁷⁵ to determine whether they are salable. If the product is salable, the returns runner brings it back to its warehouse slot. If the product is deemed not salable, the returns and refusals clerk can have it disposed of in the garbage; if he determines that the item might be salvaged and repacked, he has it moved to the salvage area, where the repacker attempts to repack it.

The returns and refusals clerk interacts with the driver bringing back the product. The driver completes a truck problem sheet report identifying any deliveries that have been refused and returned, whether because the product

⁷⁴ The Employer provides a polo shirt which the ICC wears, although he is not required to do so.

⁷⁵ There are two returns and refusals clerks. One returns and refusals clerk works from 10:00 a.m. until 6:30 or 7:00 p.m. The other starts at 11:30 a.m., and it appears from the record that he works until 8:30 or 9:00 p.m.

was damaged, it was the wrong product, or the customer cancelled the order. The returns and refusals clerk examines the truck problem sheet as well as the invoice and the trip manifest to make sure they comport with the order removed from the truck. A returns and refusals clerk testified that he also records data from the label for each returned order and conveys this data to the night warehouse supervisor.

The returns and refusals clerk then enters data in the computer (using Tandem), including the invoice for the returned order, and he credits the customer's account and enters the explanation.

The returns and refusals clerk works in a small office located on the dry dock, roughly 25 to 30 feet from the doors on the dry dock.⁷⁶ He shares this office with the produce buyer. A returns and refusals clerk testified that he spends roughly 45 to 50 per cent of his shift in this office.

A returns and refusals clerk testified that he handles returned product on the loading dock. For example, he separates returned chemicals on a separate pallet, and places items that had been mispicked the previous night on a pallet for the night shift warehouse employees to store. He testified that he also sometimes helps the driver unload the return, and that he enters the truck to record the temperature of any returns that must be maintained at specified temperatures. He testified that he sometimes tells the returns runner about a frozen or refrigerated return that needs storage within a prescribed time frame.⁷⁷

⁷⁶ A returns and refusals clerk testified that the office looks like a trailer.

⁷⁷ Refrigerated returns are supposed to remain on the dock for no longer than 15 minutes, and frozen returns for 30 minutes.

The returns and refusals clerk is required to wear steel toed shoes. He is certified to operate motorized pallet jacks. He uses both Kronos time clocks.

Both returns and refusals clerks have filled in for the will call clerk when the latter was absent, including once for a week, and both fill in for her every day when she is at lunch. An ICC fills in for a returns and refusals clerk when the latter is out.

The returns and refusals clerk is paid within a range of \$14.07 to \$17.66 per hour.

Will Call Clerk

The will call clerk works with the will call selector in the will call office, which is open Monday through noon on Saturday.⁷⁸ She coordinates will call orders for pickup at the warehouse.⁷⁹ She uses Tandem to access and print out pick tickets for each order⁸⁰ and organizes them according to when the order is to be picked up. She gives these tickets to the will call selector, who goes into the warehouse to remove the items in the order, and bring them to the will call cooler to be staged.⁸¹ When the will call selector is busy, the will call clerk stages the order.

For will call orders of 20 cases or more, the will call clerk must obtain approval from the day warehouse supervisor, the day manager or the Vice President of Operations. The supervisor or manager then sends extra help with

⁷⁸ The will call clerk works from 7:45 a.m. until about 5:30 p.m. Monday through Friday and from 8:00 a.m. until noon on Saturday.

⁷⁹ Roughly half of the will call orders are from customers and the rest are from sales persons buying on their behalf.

⁸⁰ Pick tickets are the same as pick labels used by selectors at night.

⁸¹ As explained in discussing the will call selector, the will call clerk brings the order from the will call cooler into the will call office area, where it is picked up by the customer. Both the will call selector and will call clerk assist the customer in carrying the order out to the customer's vehicle.

pulling the order. Normally, the slow pick forklift operator is sent. The will call clerk tells the employee(s) helping what the order is, which order to pull first if there are multiple orders, etc. Large orders are staged on the freezer dock (which is close to the will call cooler); the will call clerk occasionally assists.⁸²

The will call clerk has almost daily contact with the recovery or hotshot driver, who comes in late in the morning to pick up will call orders. The will call clerk also interacts with drivers who pick up will call orders.⁸³ For instance, she signs their invoices. She also interacts with the day receiving clerk to coordinate which door the driver should use. Occasionally, a customer brings in a return to the will call office; the will call clerk contacts a returns and refusals clerk to remove it.

The will call clerk takes cash and checks from customers and issues receipts. She records the payment and gives it to the cashier either at the end of the day or when she has time.

The will call clerk testified that she spends about 60 to 70 per cent of her time working on her computer in the will call office and 30 per cent at the will call cooler. She clocks in using the Kronos by the main warehouse entrance.

The will call clerk is not certified on a lift or pallet jack. She is not required to wear a uniform or steel toed shoes. The Employer supplies company shirts, which she wears three to four times per week.

⁸² The will call clerk testified that she helps out on the dock two to three times per day for a few minutes each time.

⁸³ These include drivers for outside carriers as well as the Employer's drivers picking up for another facility.

The will call clerk is paid \$16.49 per hour. According to the job posting, the will call clerk must pass a criminal background check and credit check.

When the will call clerk is out, the ICC or returns and refuels clerk fill in.

Cashier

The cashier works in an office adjacent to the transportation office and looking out into the driver lunch room. He receives and verifies cash, cashier's checks and money orders from incoming drivers and prepares receipts and cash sheets that record what the customer has paid for each item.⁸⁴ Employees who purchase items from the Employer also pay the cashier. He enters data in Tandem to record and balance driver collection reports, and performs related functions.

The cashier is not required to wear steel toed shoes or a uniform. He is not bonded.

About one year ago, a local driver worked as a cashier while the cashier recovered from an accident.

The cashier works from 10:00 a.m. until 6:00 p.m. The cashier is paid \$11.90 per hour.

3. Positions in the Transportation Department That the Employer Seeks to Include

Lead Router, Backup Router, and DOT Clerk

These three positions work in the transportation office.

The lead router, also called senior router, works from 10:00 a.m. until 7:00 or 7:30 p.m., Sunday through Thursday. He creates the delivery schedule for the

⁸⁴ The will call clerk brings to the cashier the cash received from customers who come in to pick up their orders.

Employer's drivers for the following day. He downloads the orders from customers and the Employer's sales force from Tandem into a program called Roadnet that shows how long each delivery should take and the time between deliveries, enabling the lead router to assign routes to drivers in a manner that accommodates customer priorities, delivery areas served by the Employer, and DOT regulations. (The U.S. DOT imposes limits on the driving time of commercial vehicle drivers. For example, they may not drive for more than 14 consecutive hours after coming on duty following at least 10 consecutive hours off duty.)

The lead router testified that he determines each driver's final route, and that Roadnet uses the routes he has created to devise schedules. When a customer with a consistent delivery time changes it, the lead router assigns the delivery to another truck and makes sure delivery windows are met, the newly assigned truck has enough capacity for the new load, etc.

Once the routes have been finalized, they are uploaded back into Tandem, which generates each driver's manifest. The routes are then sent electronically to Truck Builder, which generates the load map that loaders use to determine where each pallet is placed on each truck so the truck can be unloaded efficiently.

It appears from the record that the backup router performs the same duties as the lead router except that he works exclusively with Tandem and Truck Builder.⁸⁵ He also works with night warehouse employees to pair doors

⁸⁵ It appears from the record that the lead router and backup router work into the evening. The record reflects that a loader assists the routing clerk with Truck Builder from about 5:00 p.m. each

with routes efficiently, and with switchers to ensure that the appropriate loading equipment is placed at each door.

There is some confusion in the record as to the current status of the backup router, specifically, who fills this position. The lead router testified that the backup router performs as lead router one day per week, (apparently Friday), as well as whenever the lead router is absent.⁸⁶

The DOT clerk, also called logistics clerk, receives calls from drivers concerning breakdowns, product shortages, and various other problems. He maintains DOT records. He also makes appointments for the backhaul stops by delivery drivers returning to the Tampa facility, and for logistics drivers, who bring products in from the Employer's other facilities and ship products out to those facilities. The DOT clerk also collects and files daily vehicle inspection reports for each tractor and trailer. The DOT clerk works from 7:30 a.m. until 4:00 p.m.

The lead router, backup router, and DOT clerk are not required to have a commercial drivers license⁸⁷ or to be certified to operate warehouse equipment. They are not required to wear either a uniform or steel toed shoes.

The record reflects that the lead router, backup router, and DOT clerk are paid within a range of \$13.52 per hour to \$20.00 per hour. The Vice President of

evening for two to four hours, depending upon the volume of deliveries to be scheduled. This loader then resumes his normal duties.

⁸⁶ The lead router testified that the individual filling the position of backup router at the time of the hearing was a "delivery supervisor," a position not discussed by the parties. The lead router and the transportation supervisor both testified that at the time of the hearing, a lead driver named Randy Hendricks was being trained as backup router. The record contains the Employer's purportedly complete list of employees in all positions at issue, and Randy Hendricks does not appear on this list. The transportation supervisor also testified that he supervised the senior router and a position he called "routing clerk," which the parties did not appear to specifically address, but which appears to be the backup router.

⁸⁷ Although the job posting for router in the record states that a current Class A license is required, a transportation supervisor testified that it is not.

Operations testified that the lead router is paid roughly \$20.00 per hour, and that the backup router is paid about \$16.00 per hour and that the DOT clerk is paid about \$14 per hour.

An Overview of the Employer's Drivers

The Employer has several different classifications of driver.⁸⁸ All make deliveries, although shuttle drivers and logistics drivers do not unload at the customer's location or have direct contact with the customer. Drivers in contact with the customer must wear a shirt that displays the Employer's logo.

Shuttle drivers based in Tampa, local drivers, lead drivers, and the recovery driver report to the Tampa facility at various times and return when their shift is complete. Shuttle drivers based in a remote location and domiciled drivers report to their remote location. All drivers except logistics drivers and domiciled drivers use the Kronos time clock in the driver lunch room. All drivers (except apparently logistics drivers) must first clock into ZADA, a system that tracks the driver's on duty and off duty hours for purposes of compliance with DOT regulations; each truck has a GPS that is integrated with ZADA to ensure an accurate record of the driver's actual driving time. The ZADA machine is located near the Kronos in the driver lunch room.

All drivers are supposed to spend no more than 20 to 30 minutes performing pre-trip and post-trip duties (these duties are described below). In other words, drivers are supposed to be on the road within 20 to 30 minutes of clocking in (whether at Tampa or one of the remote locations), and clock out

⁸⁸ The Employer also uses the title "delivery driver" to refer to domiciled drivers, local drivers, lead drivers, and the recovery driver.

within 20 to 30 minutes of returning. Thus, shuttle drivers based in Tampa, local drivers, lead drivers, and the recovery driver typically spends between forty and sixty minutes per day at the Tampa facility.

All drivers (except apparently the recovery driver) must have a Class A commercial driver's license; the recovery driver has only a Class B commercial driver's license. In addition, shuttle drivers must have endorsement to carry double trailers because they usually drive double trailers. Drivers are not required to be certified to drive a forklift.

All drivers must pass a DOT physical; not have more than two convictions in the past two years for moving traffic violations, or a D.U.I. conviction within the past three years, regardless of the type of vehicle operated; pass the DOT written exam for drivers;⁸⁹ pass a controlled substance abuse screening test; and apparently pass an Employer-required drive test.⁹⁰ In addition, drivers must have at least two years of over-the-road commercial driving experience or one year as a foodservice delivery representative.

Logistics Driver

The Employer's logistics driver collects products from various Florida facilities of the Employer for the purpose of storage at the Tampa facility until one of the Employer's sister facilities (usually in another state) requests those products. The logistics driver then carries product stored in Tampa to the sister facility. These products are never considered actually "received" by the Tampa

⁸⁹ This appears to be a separate requirement from the requirement for a Class A commercial driver's license.

⁹⁰ The Employer allows employees who have passed the written portion of the DOT test to practice on its trucks on the clock under the guidance of a licensed driver.

facility, but are in effect held over for delivery elsewhere.⁹¹ The Employer also contracts with outside carriers to supply drivers who perform the same functions, and these outside carriers employ their own over-the-road drivers. As explained above, the day receiving clerk coordinates with the logistics driver and the carrier driver regarding when to arrive and which door to use.

Logistics drivers work in teams of two. Their routes take about 40 hours, twice per week, with a day off in between. For example, a team leaving at 1:00 a.m. Monday returns Tuesday evening, and leaves again on Thursday. Logistics drivers have no direct contact with the Employer's customers, and are not required to wear any type of uniform. They maintain contact with the Employer via Nextel phones.⁹²

Before leaving Tampa, logistics drivers weigh the load on each drive axle; if it exceeds the limit,⁹³ the driver reconfigures the load, moving pallets around as needed. The transportation supervisor oversees this process, which occurs about once a week.

Logistics drivers maintain handwritten logs, unlike the other drivers.

Logistics drivers are paid by the mile. They receive \$.47 per mile; they are paid \$19.05 per hour for time spent unable to drive as the result of a breakdown, and for time attending mandatory meetings, training, etc. They must clock in at the Kronos time clock, but they are the only drivers who do not use the ZADA timekeeping system as well.

⁹¹ Logistics drivers sometimes return with backhaul from the sister facility. The backhaul is unloaded by warehouse employees.

⁹² It appears from the record that the Employer issues these phones to some, but not all, logistics drivers.

⁹³ The record does not reflect whether these are DOT limits, the Employer's limits, or both.

Shuttle Drivers and Domiciled Drivers

Shuttle drivers bring loaded trailers each evening from Tampa to one of five yards rented by the Employer in remote locations and leave them for domiciled drivers to pick up. The domiciled driver does not work out of the Tampa facility, but out of one of the five remote locations.⁹⁴ He delivers whatever was in the trailer brought by the shuttle driver. The domiciled driver returns the trailer to the same remote location, either empty or with backhaul that the domiciled driver collected. The trailer is picked up by a shuttle driver and driven back to Tampa.

Three of the five remote locations are yards leased from Penske. The Ft. Myers yard contains a building with a small office and bathroom. It is used by 10 domiciled drivers in addition to the two shuttle drivers. The Ocala yard is a Penske yard where trucks are stored, and also contains a building with a small break room. It is used by five domiciled drivers and one shuttle driver. The Orlando yard is a Penske yard, used by one domiciled driver. The Lake City yard is space rented from a truck repair company. Two domiciled drivers use this yard. The Port Orange yard is part of another distribution center; the only domiciled driver at this location does not use the distribution center or work under its supervision.

The shuttle drivers in Tampa report at about 7:30 p.m.⁹⁵ They check with the router to find out their route numbers, confer with a switcher to find out which

⁹⁴ It is not apparent from the record whether the three shuttle drivers who start in remote locations are based in those locations or in Tampa.

⁹⁵ There are five shuttle drivers, only two of whom are based in Tampa. Two shuttle drivers are based in Ft. Myers and one in Ocala; they report at their remote sites at 5:00 p.m. and bring

trailer is assigned, collect their paperwork from the cubbyholes in the driver lunch room or from the night shipping and receiving clerk, check to make sure the load is secure and complete, hook up their trailers to their tractor, perform a pre-trip inspection,⁹⁶ and depart.

The Tampa based shuttle drivers usually perform two round trips of about four hours each per night. If the shuttle driver has backhaul on the trailer brought back to Tampa, it is unloaded by night warehouse employees.

If the shuttle driver notices a problem with his paperwork or his load and the transportation supervisors and manager have left for the day, the shuttle driver consults a night warehouse supervisor or the night manager. The shuttle driver has no responsibility to load and unload, but if a pallet has shifted in transit, the shuttle driver will reposition his load so the domiciled driver who delivers it won't have difficulty. The shuttle driver brings the delivery paperwork (invoices, hazardous materials sheets, etc.) to the domiciled driver assigned to pick up that trailer.

Domiciled drivers report to their respective yards between 4:00 a.m. and 5:00 a.m.⁹⁷ They perform the pre-trip inspection, check their load and depart for deliveries. They usually return to their respective remote yards between 4:00 and 5:00 p.m.

empty trailers back to Tampa, as well as any returns, then drive back to their remote yard with a full load.

⁹⁶ This consists of checking tire pressure, brakes, turn signals, etc. and completing a daily vehicle inspection report.

⁹⁷ The Ft. Myers remote location also has a time clock; domiciled drivers at the other remote locations maintain handwritten time records. All domiciled drivers clock into ZADA, and it appears from the record that there are ZADA systems at each remote location.

When a shuttle driver is absent, a delivery driver or, in the case of Ft. Myers, a remotely based shuttle driver usually substitutes for him.⁹⁸ A local driver filled in for a domiciled driver on two occasions.

All drivers, including domiciled and remotely based shuttle drivers, are required to attend safety training in Tampa twice per year, as well as certain meetings in Tampa two or three times per year.

Additionally, the Employer conducts quarterly meetings for all Tampa employees in all departments to review safety issues and recent company developments, and to conduct special presentations such as the Employer's annual ethics training. The domiciled drivers and remotely based shuttle drivers attend quarterly meetings at their remote yards to review the same issues, usually with the transportation manager, safety specialist, Vice President of Operations, Vice President of Human Resources, and various other high level managers.⁹⁹

One Saturday shortly before the hearing, all drivers were required to come to Tampa for a safety refresher course featuring training by a DOT official regarding a new tracking system for violations.¹⁰⁰

Shuttle drivers and domiciled drivers receive \$19.05 per hour, and shuttle drivers also receive the \$.25 per hour night differential.

⁹⁸ The Vice President of Operations testified that the yard jockey occasionally fills in for a shuttle driver.

⁹⁹ Until the night manager left, he also attended these meetings and addressed issues the domiciled drivers raised.

¹⁰⁰ The Employer provides financial assistance to employees who take courses to obtain additional certifications in their field.

Local Driver

Local drivers leave every morning from the Tampa facility to make deliveries throughout Florida.¹⁰¹ They sometimes return with backhaul or with products wrongly delivered, damaged, etc.

The local driver begins at any time from 3:00 a.m. to 6:00 a.m. and finishes at any time from noon to 7:00 p.m. He receives his paperwork packets, including manifest, invoices, hazardous materials sheet, daily vehicle inspection report form, and the truck problem sheet.¹⁰² He then moves the tractor assigned to him to the loading dock to attach the preloaded trailer, performs a pre-trip inspection of his truck and trailer, checks inside the trailer to make sure his load is secure and complete, loads whatever safety equipment he needs as well as equipment he may need for unloading deliveries, such as a hand truck and pallet jack,¹⁰³ and departs.

Upon returning to the Tampa facility, local drivers back into the appropriate dock, remove whatever equipment they had on board, place it in designated storage locations,¹⁰⁴ unload returns¹⁰⁵ and any backhaul picked up after making deliveries, and bring any cash received to the cashier. They turn in their paperwork and then clock out on Kronos.¹⁰⁶

¹⁰¹ Local drivers may deliver to the same customers as domiciled drivers, but in larger quantities and making fewer stops per day; this allows the Employer to comply with DOT regulations concerning consecutive driving hours and time off duty.

¹⁰² The local driver either finds their packet in cubbyholes in the driver lunch room or receives it directly from a night shipping and receiving clerk.

¹⁰³ Motorized pallet jacks are needed to unload on certain routes, while the manual pallet jack is used on all.

¹⁰⁴ For instance, the pallet jacks must be stored near the dry dock.

¹⁰⁵ It appears from the record that local drivers bring returns to one of the three designated areas where the returns and refusals clerk examines them.

¹⁰⁶ Drivers do not clock out of ZADA.

The local drivers do not usually load their own trucks before departing Tampa. They unload their deliveries at customer locations.¹⁰⁷ However, a local driver testified that local drivers occasionally help loaders load trucks when the loaders are behind schedule. A local driver also testified that sometimes loaders place products out of sequence, causing him to lose time at certain delivery stops moving products around, and that if he notices the error before departing Tampa, he unloads his truck to the point where he locates the out-of-sequence product, then reloads it correctly. He testified that warehouse employees assist him in roughly 10 per cent of these reloads. Similarly, if the driver finds that the wrong trailer was loaded for his route, the warehouse employees sometimes help him unload and reload.

Local drivers receive a 30-minute unpaid lunch break, and two paid 15-minute breaks during their shift; they choose when to take lunch and breaks.

In general, local drivers are supervised by transportation supervisors. For example, transportation supervisors audit each local driver's ZADA data monthly and meet with the driver to discuss whether he is meeting the Employer's goals for speed of delivery, idle time of his truck, etc.

Warehouse supervisors occasionally are involved in resolving problems. For example, a transportation supervisor testified that recently, a local driver brought him invoices for the wrong day; the transportation supervisor called the night warehouse supervisor so he could access Tandem to print out the proper

¹⁰⁷ Although the record is not entirely clear, it appears that local drivers must be certified to use a motorized pallet jack.

invoices. If a refrigeration truck is not cooling properly, the local driver may seek assistance from loaders to unload and reload.

When a local driver is absent, another local driver usually fills in.

Lead Driver

There are two lead drivers, one based in Tampa and one in Ft. Myers. They each work as local drivers. The Employer's job posting for lead driver states that the lead performs regular route driver duties, trains new hires on procedures and policies pertaining to the Tampa division, works with delivery supervisors on improving overall performance within the transportation department, and rides with drivers that have below average scores on quarterly reviews, identifying areas of concern and possible solutions to supervision. The Vice President of Operations testified that the lead drivers have longevity with the Employer and are required to have demonstrated leadership.

Lead drivers receive \$19.05 per hour as well as the \$.70 per hour lead differential.

Recovery Driver

The recovery driver, also called the hotshot driver, works from about 9:00 a.m. until between 4:00 p.m. and 6:00 p.m. He delivers items that were not delivered with the customer's order, either because of a truck short, mis-pick, change in the order, etc. The recovery driver delivers most will call orders,¹⁰⁸ and sometimes assists the will call customer in loading the order if the customer

¹⁰⁸ It appears from the record that orders necessitated by mis-picks and shorts are also considered will call orders.

is picking it up.¹⁰⁹ The recovery driver sometimes receives assistance from day warehouse employees in loading his truck.

The recovery driver also picks up fresh fish and meat as backhaul from locations in an adjacent county after making his last delivery, and returns it to the freezer dock at the Tampa facility. If no supervisor is available, the recovery driver checks in with a receiver or day utility worker and assists them in unloading his truck.¹¹⁰

Occasionally when a shuttle driver leaves a loaded trailer in the yard because no door is available for unloading, the recovery driver pulls the trailer to an open door and assists in unloading.

The recovery driver must be certified to operate a motorized pallet jack. He wears a uniform and receives \$17.33 per hour rather than \$19.05 per hour because he has only a class B commercial driver's license; he testified that he has passed the test to upgrade his license to Class A, but has not been to the Department of Motor Vehicles to do so yet.

Switcher

The switchers, also called yard jockeys, begin at 4:00 p.m. and 5:00 p.m. respectively. They move empty tractors and trailers within the Tampa yard so that the trailers are positioned at the correct time and at the correct door for loading by the night warehouse employees.¹¹¹ Once a trailer has been loaded, a night warehouse supervisor tells the switchers that it's ready for them to pull it out

¹⁰⁹ If he discovers a mis-pick or other error in filling the will call order, the recovery driver tells the will call clerk who addresses the error.

¹¹⁰ Non-supervisory day warehouse employees check in the recovery driver about 50 per cent of the time.

¹¹¹ There are four sizes of trailer.

of the door.¹¹² The switchers position it in the yard for the driver assigned to that trailer, then bring another empty trailer up to the door. Switchers receive paperwork each evening from the senior router identifying the trailers and doors into which they are to be pulled.

Switchers spend most of their shift in the yard. They occasionally come inside the warehouse to use the driver lunch room and to update the night schedule if, for example, equipment malfunctions and a trailer has to be switched to another door. On occasion, a yard jockey will fill in for a shuttle driver.

Switchers must have a Class A commercial driver's license. They are paid \$17.81 per hour.

E. Interchange and Transfers

With respect to temporary interchange between the positions the Union seeks to represent and those the Employer argues must be added, the Vice President of Operations testified that day and night warehouse employees do not substitute for transportation department employees, nor do transportation department employees substitute for day or night warehouse employees. Similarly, there is no evidence of such temporary interchange between transportation and finance department employees, and virtually none of temporary interchange between the Finance department and other departments.¹¹³

¹¹² After 6:00 p.m., the yard jockeys are supervised by the night supervisors. A transportation supervisor testified that communications between switchers and night warehouse supervisors are infrequent.

¹¹³ Thus, when an ICC, returns and refusals clerk, or will call clerk is absent, another employee in one of these positions fills in; the only evidence of temporary interchange between the Finance department and another department is that a local driver worked as a cashier when the latter was out due to an accident.

The record reflects that employees in some of the positions the Employer seeks to add occasionally substitute for employees in the positions the Union seeks to represent and vice-versa. However, the record is somewhat confusing in this regard, there is little record evidence as to the frequency or specific examples of such interchange, and in some instances, an employee in one position is merely helping an employee in another due to job volume, rather than substituting for a shift.

Thus, day lift operators substitute for a day receiving clerk when the latter is on vacation; the Vice President of Operations testified that this occurs roughly six or seven weeks per year. It also appears from the record that a day utility worker and a receiver also occasionally substitute for a day receiving clerk.

The record also reflects some temporary interchange between positions within and between the day and night warehouse departments, but such evidence has little relevance to the issues before me. Similarly, a local driver substituted for a domiciled driver twice, and a delivery driver or a yard jockey generally substitutes for an absent shuttle driver, but these are all positions within the transportation department and all involve drivers.

With respect to permanent transfers between the positions the Union seeks to represent and those the Employer argues must be added, the record reflects several examples of employees transferring from warehouse positions to positions that the Employer seeks to add, but little evidence of transfers in the other direction – from the transportation and finance departments into the warehouse. Thus, a night selector hired in October, 2006, transferred to a

position as night shipping and receiving clerk in May, 2008; a night warehouse employee¹¹⁴ transferred to a position as a switcher;¹¹⁵ a logistics driver who was hired about 15 years ago as a selector, obtained a Class A CDL, transferred to a position as local driver about eight years ago, then became a logistics driver last year; and two drivers whose licenses were removed for about two years due to improper time keeping worked during the interim in night warehouse position and as switchers.¹¹⁶

It further appears from the record that employees sometimes progress from the night selector position to a night lift operator position, and ultimately transfer to positions in the day warehouse, finance, or transportation. The record contains two examples of current non-supervisory employees who progressed in this manner; all of these employees have been in their current positions for several years.¹¹⁷ Similarly, three current supervisors held various positions in different departments prior to becoming supervisors several years ago.¹¹⁸

There is also evidence of transfers within the departments. For example, selectors have transferred to positions as night lift operators, then to positions as lift operator on day shift. Delivery drivers have transferred to logistics driver.

¹¹⁴ The Vice President of Operations testified that this employee was either a selector or loader.

¹¹⁵ The record does not reflect when he transferred.

¹¹⁶ In addition, several current shuttle drivers held different driver positions for several years, including driver positions in the Employer's sister divisions.

¹¹⁷ A receiver testified that he started as a selector, and became a loader, a night operator, a day slow pick selector, and a day operator, before becoming a receiver about ten years ago. The lead router testified that he started as a selector, became a driver, transferred to sales, and has been a router for about seven years.

¹¹⁸ A night warehouse supervisor started as selector, transferred to various day warehouse positions, worked as an ICC and returns and refusals clerk, and became a night supervisor about five years ago; and a transportation supervisor started as selector, transferred to a position as a driver, worked in this position while training as backup router, transferred to lead router, and worked his way up to transportation supervisor, the position he has held for eleven years. An inventory control manager was hired as selector, transferred to a position as ICC, and has held his current position for ten years.

F. Other Terms and Conditions

All employees are eligible for the same benefits, including medical, dental, vision, life insurance, 401(k), and short and long-term disability insurance.¹¹⁹ All employees are subject to the same hiring policy. The Employer performs the same background check and pre-employment drug test on all employees.¹²⁰ The Employer's Associate Handbook applies to all employees; common policies include an internal complaint procedure, and a business code of ethics.

Certain policies apply only to employees of the Employer's Tampa division. These include the \$.13 per hour safety incentive, described above.¹²¹ The Employer also established a "Quarterly Safety Incentive Drawing Program" for hourly warehouse and transportation department employees in safety sensitive positions. Each quarter, one employee is selected at random for a cash award from among those who were free of OSHA recordable injuries or chargeable accidents, and have not been disciplined that quarter for failure to follow safety policies and procedures. The Employer also rewards departments completing 1,000 days without a recordable accident with a steak dinner.

Each quarter, employees in Tampa also nominate a co-worker for the "Difference Maker" award; management determines the winner.¹²² The record reflects that within the past three years, warehouse department employees and drivers have won.

¹¹⁹ The Employer does not have any part-time employees.

¹²⁰ Drivers and selectors are also required to undergo a pre-employment physical exam.

¹²¹ Although a document in the record titled: "2008 Tampa Division Safety Incentive Program" appears to make all Tampa division employees eligible for this incentive, the Vice President of Human Resources testified that it covers only those in safety sensitive positions.

¹²² The winner receives \$250 and a plaque.

The Employer also stages what is referred to as the “rodeo” annually. This is an employee appreciation event for employees and their families, at which employees compete in a variety of ways using warehouse equipment. The Employer also occasionally puts on golf tournaments and organizes fishing trips for employees.

There are five bulletin boards in the Tampa facility, including one in the driver lunch room. Human Resources uses three bulletin boards for job postings,¹²³ the federal minimum wage notice, announcements of company meetings, etc.¹²⁴

All employees receive the same orientation with respect to the Employer’s human resources policies and procedures.

In addition, the safety specialist conducts safety training at orientation that includes facility-wide training common to all positions, such as machine safeguarding and accident reporting procedures, and training specific to each job, such as how the driver should conduct a pre-trip inspection of his truck, and ergonomics training for the warehouse employee. New hires working in safety sensitive positions must pass an “SOP”(standard operating procedures) written test, which differs somewhat for drivers and warehouse employees. SOP training is done every year. Drivers and warehouse employees also receive different hazardous material training, which is also administered every two years

¹²³ All openings are posted internally for five days before the Employer advertises to outside applicants.

¹²⁴ The board in the driver lunch room contains items specific to drivers as well as items of general concern.

for existing employees. Drivers must also receive notification of a new federal law prohibiting texting while driving.

New hires working with seafood in a safety sensitive position must pass the HACCP¹²⁵ test, which is also administered annually to existing employees working with seafood in safety sensitive positions. All new hires must pass the same product protection training quiz (the Employer also refers to this as the “asset protection” quiz); it appears from the record that all existing employees must pass this test annually as well.

G. History of Collective Bargaining

Employees at the Employer’s sister facilities in some states are represented by a union. The International Brotherhood of Teamsters represents units consisting of both warehouse employees and drivers at the Employer’s facilities in Englewood, Colorado, Indianapolis, Indiana, and Plymouth, Minnesota. The Teamsters also represent units composed solely of warehouse employees at facilities in Bridgeport, New Jersey, Bensenville, Indiana, St. Louis, Missouri, and a unit composed solely of drivers at the facility in Bridgeport, New Jersey. The record does not reflect whether the warehouse units included the positions in dispute herein, in the finance and transportation departments. The record also does not indicate whether the parties agreed to these units by stipulation.

¹²⁵ This stands for “hazard analysis critical control point.”

H. Legal Analysis

1. Positions of the Parties

The Union argues that the unit it seeks, composed of all day and night warehouse classifications except the day receiving clerks, is an appropriate unit that shares an identifiable community of interest distinct from other employees. The Union contends that it is not required by the Act to seek to represent a more comprehensive grouping of employees and that the Board has long held that there is ordinarily more than one way to group employees into an appropriate unit. The Union cites Home Depot U.S.A., 331 NLRB 1289 (2000), in which the Board reversed the Acting Regional Director and found that the petitioned-for unit of drivers and dispatchers who drive was an appropriate unit and need not include other employees despite evidence of overlapping job functions and interchange.

The Employer argues that the day receiving clerk cannot logically be separately represented from the night shipping and receiving clerk in the petitioned-for unit, and that the remaining clerical positions in dispute are warehouse (plant) clericals whose functions are closely allied and integral to the Employer's operations.

The Employer maintains that there is such a high degree of functional integration between drivers and the petitioned-for positions as to require the inclusion of the drivers.

2. The Traditional Community of Interest Factors

The first issue before me is whether the day and night warehouse employees, excluding the day receiving clerks, share a community of interest separate from the drivers and various clerical employees the Employer seeks to include. The unit sought in the petition need not be the most appropriate unit, as long as it is an appropriate unit.¹²⁶ Thus, the Board looks first at the petitioned-for unit to see whether it is “an appropriate unit.”¹²⁷ The Board tries to select a unit that is the “smallest appropriate unit” encompassing the petitioned-for employee classifications.¹²⁸

In evaluating whether positions share a community of interest, the Board considers common supervision; similarity in employees’ skills, training, and functions; similarity in the scale and manner of determining earnings; similarity in benefits and working conditions; contact among employees; degree of functional integration; interchange; geographical proximity; and the history of any collective bargaining involving the parties. See Turner Industries Group, LLC., 349 NLRB 428, 430 (2007); Kalamazoo Paper Box Co., 136 NLRB 134, 137 (1962).

Applying these factors, I find that an appropriate unit including the petitioned-for unit of day and night warehouse employees must also include the day receiving clerk, and the remaining clerical positions in dispute, but not the drivers. I will now apply the above factors to the evidence in the record, beginning with the drivers.

¹²⁶ Overnite Transportation Co., 322 NLRB 723 fn. 1 (1996); Dezcon, Inc., 295 NLRB 109, 111 (1989); see also P.J. Dick Contracting Inc., 290 NLRB 150 (1988).

¹²⁷ Dezcon, Inc., *supra* at 111; P.J. Dick Contracting Inc., *supra*, at 151.

¹²⁸ Overnite Transportation Co., 331 NLRB 662, 663 (2000).

3. Drivers (including Switcher)

The drivers' duties, skills, qualifications, and working conditions are clearly distinct from those of the petitioned-for day and night warehouse employees.

Drivers must have a Class A commercial driver's license.¹²⁹ They must also pass a DOT written exam and the Employer's driving test; pass a DOT physical; meet certain standards with respect to their driving record; and have at least two years of experience as an over-the-road commercial driver or one year as a food service delivery representative. Unlike many of the warehouse positions the Union seeks to represent, drivers are not required to be certified to operate a forklift. Although the record is somewhat unclear, it appears that drivers and the ICC are the only positions that the Employer seeks to add that are eligible for the \$.13 per hour safety incentive.

Most drivers have frequent direct contact with the Employer's customers at the customer's place of business, unlike warehouse employees.¹³⁰ The drivers who interact with customers must wear uniforms. All drivers use a separate entrance to the Employer's Tampa facility from that used by all other employees. Drivers must clock into ZADA, unlike all other employees, and they may use only one of the two Kronos time clocks inside the Tampa facility, while warehouse employees generally use the other. Drivers have a lunch room that, although shared on occasion with some warehouse employees, appears from the record to be used mainly by drivers.

¹²⁹ The recovery driver has only a Class B license but is in the process of acquiring his Class A license.

¹³⁰ The will call clerk and will call selector have customer contact, but at the Employer's facility, and the duration of each such contact appears limited.

Drivers also receive certain training different than that given to the warehouse employees. For example, newly hired drivers are trained in pre-trip inspections and not in ergonomics, as newly hired warehouse employees are, and drivers must pass a different SOP test and receive different hazardous materials training than warehouse employees.

The drivers have separate first and second level supervision from the positions the Union seeks to represent. The Board has cited separate immediate supervision in finding petitioned-for units appropriate and rejecting employers' claims that an appropriate unit must include all employees.¹³¹ Moreover, the Board relied in part upon separate supervision in finding that a separate unit of warehouse employees was appropriate in both exclusively wholesale distribution facilities, and combined wholesale and retail distribution facilities, and that in such facilities, the unit need not include all remaining employees.¹³²

While I recognize that a night lift operator unloads backhaul for logistics drivers for two hours each evening, during which the transportation supervisor is the only first level supervisor on duty, the transportation supervisor testified that he does not consider himself this lift operator's supervisor, and there is no record evidence that the transportation supervisor regularly directs the lift operator, assigns him work, has disciplined him, or otherwise exercises supervisory authority over him within the meaning of Section 2(11) of the Act.

¹³¹ Washington Palm, Inc., 314 NLRB 1122, 1128 (1994); Hilton Hotel Corp., 287 NLRB 359, 360 (1987) (separate immediate supervision supports finding appropriate the petitioned-for unit of engineering department employees, locksmiths, and locksmith helpers, and rejecting employer's argument that unit must include all hotel employees)

¹³² A. Russo & Sons, Inc., *supra*; Esco Corp., *supra*.

I also recognize that switchers fall under the supervision of the night warehouse supervisor and night warehouse manager for about one to two hours each night. However, the only evidence that the night warehouse supervisor and night warehouse manager have exercised such authority is that on one occasion, a night manager issued a write-up to a switcher. Especially noting the lack of evidence as to when this occurred or how it impacted upon the switcher's terms and conditions of employment, this isolated event is insufficient to negate the fact that there are separate immediate supervisors for drivers.¹³³

There is no evidence of temporary interchange and little evidence of transfers between drivers and positions the Union seeks to represent,¹³⁴ or between drivers and the positions the Employer seeks to add. This supports the finding that an appropriate unit need not include the drivers.¹³⁵

Although drivers interact with warehouse employees regularly, it is significant that drivers are instructed to spend no more than 20 to 30 minutes at the Tampa facility prior to driving their routes, and same upon returning. I recognize that drivers enter the warehouse on occasion and have contact with positions the Union seeks to represent, as when local drivers work with loaders to reload items improperly loaded. Drivers also interact occasionally with

¹³³ The fact that drivers occasionally confer with night supervisors and the night manager about problems similarly fails to establish that the night supervisor and manager are the supervisors of the drivers.

¹³⁴ The record reflects four examples over several years: a night warehouse selector or loader became a switcher at an unspecified time; a selector became a delivery driver several years ago and became a logistics driver one year ago; the lead router started as a selector, became a driver, and then became a router seven years ago; and a transportation supervisor started as a selector, became a driver, and has been transportation supervisor for eleven years.

¹³⁵ See Home Depot USA, *supra*, at 1291 (fact that several drivers previously held other positions at some point during their career with the employer does not demonstrate substantial interchange).

positions inside the warehouse that the Employer seeks to add, as when the driver brings backhaul paperwork to the day receiver, gives the truck problem sheet to the returns and refusals clerk, and picks up will call orders from the will call clerk. However, in view of the record as a whole, these interactions fail to establish that the day and night warehouse employees lack a distinct community of interest from the drivers.¹³⁶

In Overnite Transportation Co., 331 NLRB 662, 663-64 (2000), the Board rejected the employer's argument that a petitioned-for unit of warehouse employees at the Gaffney, South Carolina service center must include city drivers, road drivers, check bay attendants, tire changers, maintenance workers, janitorial workers, OS & D clerks, and operations clerks.¹³⁷ The Board cited the drivers' separate function, special skills and qualifications, and the fact that they work away from the facility for most of the day and have no interchange with the warehouse positions. The Board noted that the regional director had found that city drivers "regularly help" and "typically" join dockworkers to load and unload city trucks, but also noted that trucks are generally loaded and ready to go when city drivers arrived for work. The same applies to the local drivers involved herein, who sometimes help loaders.

In another Overnite case, Overnite Transportation Co., 325 NLRB 612 (1998), the union sought to represent a unit of drivers, dock workers, OS & D

¹³⁶ Home Depot USA, *supra*, at 1291 (finding separate unit of drivers and dispatchers who drive appropriate despite evidence of overlapping job functions with other employees, such as pulling merchandise for delivery).

¹³⁷ The Board enlarged the unit sought by the union to include substantially all unskilled employees working at the service center.

clerks,¹³⁸ yard jockeys and building maintenance employees. The employer argued that the mechanics and petitioned-for employees must be included in the same unit because they were functionally integrated, and had a high degree of daily interaction, as when mechanics performed inspections, when drivers reported vehicle concerns to mechanics, and when breakdowns occurred on the road. Also, the mechanics purportedly interacted with dock workers when they repaired and maintained fork lifts. The Board rejected the employer's arguments in this regard.

Based upon the foregoing, and the record as a whole, I find that the drivers need not be added to the petitioned-for unit and that the unit of warehouse employees plus various clerical employees as found herein, but excluding drivers, is an appropriate unit.¹³⁹

4. Clerical Positions in Dispute

To begin with, I note that the clerical positions work in offices that, with the exception of the inventory control clerk, are located within the warehouse, unlike the main office that houses Human Resources.¹⁴⁰ The record does not reflect any work-related contact between the clerical positions in dispute and clericals who work in the main office. Thus, the clerical positions in dispute would likely

¹³⁸ This stands for "overage, shortage, and damage clerk."

¹³⁹ The record reflects that the Teamsters Union and the Employer have warehouse-only units at some locations, driver only units at some locations, and combined driver and warehouse units at some locations. The record does not reflect how the Employer operates at any of these locations, or whether the warehouse only units include the finance and transportation department positions at issue herein. The history of collective bargaining therefore has little weight in my decision.

¹⁴⁰ The ICC spends 70 to 75 per cent of the shift in the warehouse. The returns and refusals clerk has a small office on the dry dock, close to the loading doors. The will call clerk's office and cooler are close to the freezer dock. The day receiving clerks work in a small office next to the driver lunch room. The router, backup router, and DOT clerk work in the transportation office, also next to the driver lunch room.

not share a community of interest with office clericals (whom the parties agree should be excluded) and it appears that no other appropriate unit would include them.¹⁴¹ At best, it appears they would constitute a residual unit; the Board generally seeks to avoid such an outcome.¹⁴²

In cases involving petitioned-for units of warehouse employees, the Board has found that warehouse clericals should be included in the unit of warehouse employees “when the duties of the warehouse clericals are integral to the functioning of the warehouse operation.”¹⁴³ This is similar to the Board’s unit placement of plant clerical positions: workers who perform clerical duties in close association with the production process and production employees are included in a production and maintenance unit as plant clericals, even though they may exercise secretarial skills and are classified as “clerks.”¹⁴⁴ The test has generally been whether the employee’s principal functions and duties relate to the production process, as distinct from general office operations.¹⁴⁵

In Fleming Foods, Inc., *supra*, the Board held that the petitioned-for unit of full-time warehouse clericals was too narrow in part because they were residual to an existing unit of warehouse employees. The warehouse clericals performed functions that the Board considered “integral to the shipping, receiving, and storage of the Employer’s merchandise.”¹⁴⁶ These functions are many of the same functions as the clerical positions in dispute perform. In Fleming Foods,

¹⁴¹ For example, they may not share a community of interest with drivers.

¹⁴² See Huckleberry Youth Programs, 326 NLRB 1272, 1274 (1998).

¹⁴³ Fleming Foods, Inc., 313 NLRB 948, 949 (1994); John N. Hansen Co., 293 NLRB 63, 64-65 (1989); S & S Parts Distributors Warehouse, 277 NLRB 1293 (1985).

¹⁴⁴ Brown & Root, Inc., 314 NLRB 19, 23 (1994).

¹⁴⁵ Kroger Co., 342 NLRB 202, 204 (2004) (quoting Caesar’s Tahoe, 337 NLRB 1096, 1098 (2002)).

¹⁴⁶ Fleming Foods, Inc., *supra.*, at 949.

Inc., inventory clericals maintained, verified, and reconciled the paperwork describing the quantity of products stored in inventory, and also physically counted products in inventory and assisted stockers in locating products, like the ICC in the present case. The disputed positions in Fleming Foods, Inc. also included dispatch clericals, who created the paperwork needed for deliveries, similar to the router and backup router, and warehouse clericals working in receiving who delivered the appropriate paperwork to receivers to coordinate the unloading of incoming products, similar to the day receiving clerks.¹⁴⁷

Day Receiving Clerk

The day receiving clerk is supervised by the day warehouse supervisor and the day manager, a factor weighing against exclusion of this position from the unit. Moreover, I see an insufficient basis for distinguishing between the day receiving clerk and the night shipping and receiving clerk based on the degree of interaction and integration with the other petitioned-for positions or the location of the work. The day receiving clerk prepares paperwork for receivers from the receiving office next to the driver lunch room, to which employees in petitioned-for positions have access. One night shipping and receiving clerk prepares labels for selectors and works outside the Operations office, and the other prepares driver paperwork and works in the warehouse office. The shipping and receiving clerks and the day receiving clerk are paid from \$13.43 to \$16.50;¹⁴⁸ the record does not indicate any distinction other than that the night shipping and receiving clerk receive the night differential.

¹⁴⁷ Fleming Foods, Inc., *supra*, at 948.

¹⁴⁸ One day receiving clerk receives about \$15 per hour.

Neither the day receiving clerk nor the night shipping and receiving clerk is required to wear steel toed shoes. When the day receiving clerk is absent, an employee in a petitioned-for position substitutes for him.¹⁴⁹

Based upon the foregoing, and the record as a whole, I conclude that the day receiving clerks must be included in the unit.¹⁵⁰

Warehouse Clericals in the Finance Department

The duties of the ICC, returns and refusal clerk, and will call clerk are integral to the shipping, receiving, and storage of the Employer's products.¹⁵¹ They frequently interact with the petitioned-for positions, sometimes performing virtually the same functions as petitioned-for positions.

The ICC tracks inventory and researches mis-picks, truck shorts, and similar regularly recurring problems. One of the two night shipping and receiving clerks (part of the petitioned-for unit) also researches these problems. The ICC spends 70 to 75 per cent of his shift in the warehouse, interacting regularly with the lift operator, the receiver, and the slot clerk, positions in the petitioned-for unit. He uses Tandem. He is required to wear steel toed shoes¹⁵² and to be certified on the motorized pallet jack and one of the forklifts, similar to the positions the Union seeks to represent.¹⁵³ His compensation (\$16.66 to \$17.18 per hour) is similar to the rate paid to most of the positions the Union seeks to represent (\$17.24 per hour for lift operators, loaders, receivers, utility workers,

¹⁴⁹ A day lift operator substitutes for an absent day receiving clerk six to seven week per year, and a day utility worker and a receiver substitute for an absent day receiving clerk on occasion.

¹⁵⁰ Fleming Foods, Inc., *supra*.

¹⁵¹ Fleming Foods, Inc., *supra*, at 949.

¹⁵² Thus the ICC is eligible for the \$.13 per hour safety incentive.

¹⁵³ The ICC appears to use each of these from time to time.

and repacker). Further, the ICC works from 6:00 a.m. to 2:30 p.m., and thus shares hours with most day warehouse positions in the petitioned-for unit.¹⁵⁴

Although the ICC is supervised separately from the petitioned-for day and night warehouse positions, and works out of the finance office which is part of the main office suite, as noted above, the ICC spends roughly 70 to 75 per cent of his shift in the warehouse aisles. Based upon the foregoing, and the record as a whole, I find that the ICC is in the nature of a warehouse clerical and should be included. See Fleming Foods, Inc., *supra*.¹⁵⁵

The returns and refusals clerk spends about 50 to 55 per cent of his shift in the warehouse sorting, examining, and taking the temperature of returned product and sometimes unloading it. He works with the returns runner, a position in the petitioned-for unit. The tasks performed by the returns and refusals clerk with respect to returns are similar to the tasks receivers perform with respect to backhaul, checking in and counting products and verifying associated paperwork. He uses Tandem, and conveys data regarding returns to the night supervisor.¹⁵⁶

¹⁵⁴ Compare, Nuturn Corp., 235 NLRB 1139, 1140 (1978) (reversing Regional Director and finding materials control clerks were office clericals in part because they worked from 8:00 a.m. to 5:00 p.m., and warehouse employees worked either from 7:15 a.m. to 3:45 p.m. or from 4:00 p.m. to 12:30 a.m.)

¹⁵⁵ See also, Avon Products, 250 NLRB 1479, 1487 (1980) (inventory clerks who collect facility-wide data, collate it and submit it to data processing, then verify accuracy of data, must be included in petitioned-for production and maintenance unit); Sears, Roebuck & Co., 220 NLRB 1224 (1975) (finding inventory control clerks were plant clerical employees engaged in typical warehouse functions and must be included in warehouse unit, where inventory control clerks controlled inventory of merchandise in warehouse stock areas); see also, Ives Business Forms, Inc., 263 NLRB 287, 289 (1982) (finding that unit of drivers and warehouse employees must include warehouse clericals who spend 60 per cent of shift at desk and remainder in warehouse performing typical warehouse functions, such as counting merchandise and preparing specialty merchandise for packing, and noting that even at their desks, warehouse clericals processed orders and traced merchandise).

¹⁵⁶ This further indicates the high degree of functional integration of the returns and refusals clerk with the work performed by the petitioned-for unit.

The returns and refusals clerk is required to wear steel toed shoes and is certified to operate motorized pallet jacks. His pay range, \$14.07 to \$17.66 per hour, is similar to the \$17.24 per hour received by employees in most of the petitioned-for positions. When the returns and refusals clerk is absent, an ICC fills in. As explained above, I have found that the ICC must be included.¹⁵⁷

Based upon the foregoing, and the record as a whole, I find that the returns and refusals clerk is in the nature of a warehouse clerical and shares a community of interest with the petitioned-for positions such that this position should be included in the unit.¹⁵⁸

The will call clerk works closely with the will call selector, a position in the petitioned-for unit. One of her principal duties, printing out and organizing pick tickets for will call orders to give to the will call selector, appears indistinguishable from the main duty of the night shipping and receiving clerk, which is to print out labels for the selectors.

The will call clerk works throughout her shift with many other positions in the petitioned-for unit. The will call clerk stages will call orders when the will call selector is busy, and helps stage large orders on the freezer dock (located near the will call office) two to three times per day for a few minutes each time, further demonstrating the high degree of functional integration between her job and

¹⁵⁷ The fact that the ICC, returns and refusals clerk, and will call clerk are cross-trained and fill in for each other supports including all three positions in one unit.

¹⁵⁸ Fleming Foods, *supra*, at 949 (finding that credit clerical must be included in warehouse unit where credit clerical verifies that products have been returned, that customer has been credited, and that warehouse employees working in returns and salvage fill out necessary paperwork); S & S Parts Distributors Warehouse, 277 NLRB 1293, 1294-1296 (1985) (finding warehouse unit must include customer credit clerk who processes credit memos accompanying returned goods, sometimes requiring face-to-face contact with warehouse employees, despite the fact that customer credit clerk spends 85 to 90 per cent of shift in her office).

those in the petitioned-for unit.¹⁵⁹ She notifies the day receiving clerk (a position I find must be included) of trucks needing door assignments for loading certain orders. The will call clerk assists customers who come in to pick up will call orders.

The will call clerk's pay rate, \$16.49 per hour, is similar to the rate of \$17.24 per hour paid to most employees in the petitioned-for unit.

I recognize that the will call clerk is supervised separately from employees in the petitioned-for unit, is not a safety sensitive position, does not operate warehouse equipment, and works the majority of the shift in the will call office. Nonetheless, I find these factors outweighed by others demonstrating that the will call clerk shares a close community of interest with the petitioned-for employees so as to require the inclusion of this position in the unit.¹⁶⁰

The cashier performs a function integral to the warehouse operation. He interacts regularly with employees in petitioned-for positions. Moreover, the record does not reflect any contact between the cashier and office clericals working in the main office, and excluding the cashier from the unit would likely leave this position with no opportunity for representation in another appropriate unit.

¹⁵⁹ See e.g., Jacob Ash Co., 224 NLRB 74, 74-75 (1976) (reversing Regional Director and finding that warehouse clericals must be included in part because the most senior warehouse clerical picks and stages orders).

¹⁶⁰ See All American Distributing Co., Inc., 221 NLRB 980, 981 (1975) (finding that will call employee who goes into warehouse from will call room in adjacent area and works closely with warehouse employees to fill will call orders, and who assists customers who come in to pick up orders, must be included in warehouse unit); Compare, Wickes Furniture, 255 NLRB 545, 545 fn. 2 (1981) (finding will call clerks excluded from warehouse unit because they have frequent contact with, and their duties were closely related to those of other nonunit personnel, and noting that any contacts with warehouse employees mainly occur in will call office).

Although the cashier is paid \$11.90 per hour, significantly less than most positions in the petitioned-for unit, the same applies to the sanitation employees (\$11.52 to \$14.32), making the disparity less of a factor.

Based upon the foregoing, and the record as a whole, I find that the cashier shares a sufficient community of interest with the petitioned-for employees to require the inclusion of this position.¹⁶¹

Warehouse Clericals in the Transportation Department

The lead router and backup router use Roadnet to determine delivery routes and schedules, and use Truck Builder to produce load maps showing loaders the correct sequence and placement of each pallet. They receive assistance for two to four hours every evening from an employee in the petitioned-for unit. The DOT clerk receives driver calls regarding breakdowns, shortages, and other problems, maintains driver DOT records, and schedules backhaul stops.

The lead router, backup router, and DOT clerk perform work that is integral to the shipping, receiving, and storage of the Employer's products.¹⁶²

Based upon the foregoing, and the record as a whole, I find that the lead router, the backup router, and the DOT clerk share a sufficient community of interest with the petitioned-for employees to require their inclusion in the unit.

¹⁶¹ The May Department Store Co., 153 NLRB 341, 345 (1965).

¹⁶² Fleming Foods, Inc., *supra*, at 949.

CONCLUSIONS AND FINDINGS

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. The Union claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.
6. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All warehouse employees, including selectors, loaders, forklift operators shipping and receiving clerks,¹⁶³ utility workers,¹⁶⁴ sanitation employees, receivers, repackers,¹⁶⁵ will call selectors, maintenance employees, inventory control clerks, returns and refusals clerks, will call clerks, cashiers, lead routers, backup routers, and DOT clerks;¹⁶⁶ excluding all drivers, other employees, guards, and supervisors as defined in the Act.

¹⁶³ This position includes the day receiving clerk.

¹⁶⁴ This position includes the slot clerk, returns runner, and produce clerk.

¹⁶⁵ This position is also referred to as salvage clerk.

¹⁶⁶ These three transportation department positions are also referred to as transportation clerk.

Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local 79. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees

engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. North Macon Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **July 9, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the lists will be

made available to all parties to the election, please furnish two copies of the list.¹⁶⁷

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request must be received by **July 16**,

¹⁶⁷ The lists may be submitted by facsimile transmission to (813) 228-2874, or electronically to Region12@nrlb.gov, as well as by hard copy. See www.nrlb.gov for instructions about electronic filing. Only one copy of the list should be submitted if it is sent electronically or by facsimile.

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2010. The request may not be filed by facsimile, but may be filed electronically.¹⁶⁸

DATED at Tampa, Florida this 2nd day of July, 2010.

A handwritten signature in cursive script that reads "Rochelle Kentov".

Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602

¹⁶⁸ See www.nlr.gov for instructions about electronic filing and the Board's Rules and Regulations with respect to filing requirements generally.